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No. 81-92

In The

Supreme Court of the United States

October Term, 1981

LOUISE SPENCER AND MIRIAM SPENCER,
Petitioners,

vs.

RIGBY, THATCHER & ANDRUS, P.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Were federal constitutional issues raised in the state court proceedings, so as to support certiorari under 28 U.S.C. § 1257 (3), when Petitioners relied solely on state law in asserting improper procedure, a right to change venue, and a right to a jury trial, and made no mention below of Amendment 14, nor any other provision, of the United States Constitution?

2. Are there substantial federal constitutional issues of equal protection or due process of law, under United States Constitution, Amendment 14, involved in the state court proceedings, wherein:

A. Respondents, as former attorneys for Petitioners, were permitted to intervene in an existing action to foreclose an attorneys' charging lien against a fund on deposit in court, representing proceeds of a settlement achieved through the efforts of the attorneys in two related court proceedings?

B. Petitioners' objection to venue was denied consistent with state law applying residence at the commencement of an action as determining venue?

C. The case was tried to the court because no right to a jury trial exists under state law in an equitable lien foreclosure proceeding?

LIST OF PARTIES

Floyd E. Skelton and *Idaho Livestock Commission Company,* an Idaho Corporation, are the Plaintiffs in this action, No. 20,500, Seventh District, Bonneville County, Idaho. They were Respondents on the first appeal of Case No. 20,500, to the Supreme Court of the State of Idaho, and on the first Petition for Writ of Certiorari to this court, *Skelton v. Spencer,* 98 Idaho 417, 565 P. 2d 1374 (1977), *cert. den.* 434 U. S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978). They successfully pursued a claim for specific performance of settlement agreements, and following the decision of the Supreme Court of the State of Idaho, affirming the District Court judgment, they paid the settlement amount into Court and received their consideration for the setlement paid. They were served with the claim in intervention brought by Rigby, Thatcher & Andrus, but did not take part in the trial nor appeal to the Supreme Court of the State of Idaho as to the intervention claim, nor are they involved in the Petition for Certiorari now under consideration.

Louise Spencer and *Miriam Spencer* are original Defendants in Case No. 20,500. They defended in the trial involving specific enforcement of the settlement agreements, were Appellants in the appeal to the Supreme Court of the State of Idaho, and were the Petitioners in the unsuccessful Petition for Certiorari to the Supreme Court of the United States. They defended in the trial in District Court against the claim in intervention brought by Rigby, Thatcher & Andrus, were Appellants on the appeal of the court decision to the Supreme Court of the State of Idaho, *Skelton v. Spencer,* 102 Idaho 69, 625 P. 2d

1072 (1981), and are Petitioners for certiorari in this proceeding. Louise Spencer is the widow, and Miriam Spencer one of the children of S. R. Spencer, Deceased.

Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, and *Janet Spencer* were original Defendants in Case No. 20,500, but in the original trial did not oppose, but supported, specific performance of the settlement agreements. They were not involved in the appeal to the Supreme Court of the State of Idaho, nor the Petition for Certiorari as to specific performance of the settlement agreements. They defended in the trial in District Court, against the claim in intervention brought by Rigby, Thatcher & Andrus, but were not involved in the appeal from the decision of the District Court to the Supreme Court of the State of Idaho, and they are not involved in the Petition for Certiorari herein. They are the only other children and heirs of S. R. Spencer, Deceased.

Idaho First National Bank, As Executor of the Estate of S. R. Spencer, Deceased, is one of the original Defendants in Case No. 20,500, brought in District Court. The Bank defended against specific performance, but did not take part in the appeal to the Supreme Court following the District Court decision specifically enforcing the settlement agreements, nor were they involved in the Petition for Certiorari before this court. The Bank did defend against the claim in intervention brought by Rigby, Thatcher & Andrus, but were not involved in the appeal to the Supreme Court of the State of Idaho, following the District Court decision in favor of Rigby, Thatcher & Andrus, nor are they involved in the Petition for Certiorari before this court.

Rigby, Thatcher & Andrus, P.A., brought a claim in intervention in this proceeding, immediately following the decision of the Supreme Court of the State of Idaho, affirming specific enforcement of the settlement agreement becoming final, seeking to foreclose an attorneys' charging lien against the funds on deposit in District Court, and serving all other parties named herein. Following the decision of the District Court in their favor, they were Respondents on the appeal by Louise Spencer and Miriam Spencer, to the Supreme Court of the State of Idaho, and are Respondents to the Petition for Certiorari at issue here.

TABLE OF CONTENTS

	Pages
Questions Presented	i
List of Parties	ii
Table of Contents	v
Table of Authorities	vi
Opinions Below	1
Objections to Jurisdiction	2
Statement of the Case	3
Argument:	
I. Federal constitutional issues were not raised below; hence certiorari should be denied.	8
II. The state courts applied state law, without impinging on federal constitutional rights, in permitting intervention, retaining original venue, and refusing a jury trial, for equitable enforcement of an attorneys' charging lien against court-deposited funds.	10
A. Intervention Proper.	10
B. Original Venue Correct.	13
C. No Jury of Right in Equity.	15
Conclusion	16
Appendix	App. 1

TABLE OF AUTHORITIES

Pages

CASES:

American Motorists Ins. Co. v. Starnes, 425 U. S. 637 (1976) 15

Barnes v. Alexander, 232 U. S. 117 (1914) 13

Beck v. Washington, 369 U. S. 541 (1962) 10

Big Springs Land & Livestock Co. v. Beck, 45 Idaho 509, 263 Pac. 477 (1928) 14

Bolen v. Baker, 69 Idaho 93, 203 P. 2d 376 (1949) 9

Cardinale v. Louisiana, 394 U. S. 437 (1969) 8

Christensen v. Hollingsworth, 6 Idaho 87, 53 Pac. 211 (1898) 15

Dahlstrom v. Featherstone, 18 Idaho 179, 110 Pac. 243 (1910) 12

Estate of Wilson v. Aiken Industries, Inc., 439 U. S. 877 (1978) 10

Farina v. Mission Inv. Trust, 615 F. 2d 1068 (5th Cir. 1980) 11

Hill v. California, 401 U. S. 797 (1971) 8

Idaho and Oregon Land Improvement Co. v. Bradbury, 132 U. S. 509 (1889) 15

Ingersoll v. Coram, 211 U. S. 335 (1908) 16

McDonald v. E. J. Lavino Co., 430 F. 2d 1065 (5th Cir. 1970) 11

McGowan v. Parish, 237 U. S. 285 (1915) 13, 16

TABLE OF AUTHORITIES—Continued

	Pages
Moore v. Illinois, 408 U.S. 786 (1972)	10
Pence v. Sweeney, 3 Idaho [Hasb.] 181, 28 Pac. 413 (1891)	10
Spring Constr. Co. v. Harris, 614 F. 2d 374 (4th Cir. 1980)	11
State v. Burris, 101 Idaho 683, 619 P. 2d 1136 (1980)	10
Sweeney v. American Nat. Bank, 64 Idaho 695, 136 P. 2d 973 (1943)	14
Wylie v. Coxe, 56 U.S. [15 How.] 415 (1853)	13, 16
CONSTITUTION:	
United States Constitution, Amendment 14	8, 10
STATUTES:	
28 U.S.C. § 1257	2, 8
Idaho Code § 3-205	12
Idaho Code § 5-404	14
COURT RULES:	
Rule 35 (a) (3) Idaho Appellate Rules	9
Rule 35 (a) (5) Idaho Appellate Rules	9
Rule 7 (b) (3) Idaho Rules of Civil Procedure	13
Rule 24 (a) Idaho Rules of Civil Procedure	10, 12
Rule 24 (c) Idaho Rules of Civil Procedure	11
Rule 24 (a) Federal Rules of Civil Procedure	10

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OPINIONS BELOW

The judgment of the District Court, Bonneville County, Idaho, of January 21, 1976, in Case No. 20,500, Pet. App. 44-50, specifically enforced settlement agreements and ordered that the balance of the settlement price to be paid by Idaho Livestock Commission Company and Floyd E.

Skelton, aggregating $157,500.00, would be held by the court for distribution following a subsequent hearing on the merits of claims of the parties to the funds.

The decision of the Supreme Court of the State of Idaho, affirming the judgment of the District Court of January 21, 1976, is reported as follows:

> *Skelton v. Spencer*, 98 Idaho 417, 565 P. 2d 1374 (1977), *cert. den.* 434 U. S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978).

The decisions of the District Court, Bonneville County, Idaho, of March 24 and 27, 1978, in Case No. 20,500, Pet. App. 70-73, awarded attorneys fees on the claim in intervention by Rigby, Thatcher & Andrus, in foreclosure of their attorneys' charging lien on the funds on deposit in District Court.

The decision of the Supreme Court of the State of Idaho which affirmed the award of attorneys fees to Rigby, Thatcher & Andrus, from the fund on deposit in the court, Pet. App. 1-31, is officially reported as follows:

> *Skelton v. Spencer*, 102 Idaho 69, 625 P. 2d 1072 (1981).

OBJECTION TO JURISDICTION

Petitioners assert that this court has jurisdiction under 28 U. S. C. § 1257 (3).

Respondents object to the jurisdiction of the court to grant the writ of certiorari, under the statute, for the reason that the federal questions raised here were not raised during the state court proceedings.

STATEMENT OF THE CASE

Petitioners Louise Spencer and Miriam Spencer, her daughter ("Spencers"), seek review of a decision of the Supreme Court of Idaho, which affirmed an award to Respondents Rigby, Thatcher & Andrus, P.A. ("R. T. & A.") of $24,258.83 from a fund of $157,500.00 on deposit in Case No. 20,500, District Court, Bonneville County, Idaho, and $8,866.17 from funds held in trust by R.T. & A., in foreclosure of an attorneys' charging lien. Pet. App. 8-9. The court fund was the balance of a $187,-500.00 package settlement reached by Spencers, through legal services of R. T. & A., with Floyd Skelton ("Skelton") and Idaho Livestock Commission Company ("Commission Co.") on May 2, 1973. Pet. App. 5-6. The sum of $8,866.17, held in trust by R. T. & A. was the balance of a down payment on the settlement. Pet. App. 8.

After Spencers received the $30,000.00 down payment on the $187,500.00 settlement, they refused, in July 1973, to honor the settlement and discharged R. T. & A. as their attorneys. Pet. App. 6.

On December 6, 1973, Skelton and Commission Co. brought suit in District Court, Case No. 20,500, Bonneville County, Idaho against Spencers, and also against Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, and Janet Spencer, all other children and heirs of S. R. Spencer, Deceased and Louise Spencer, his widow ("Spencer Children"), and the Idaho First National Bank as Executor of the Estate of S. R. Spencer, Deceased ("Executor Bank"). Pet. App. 33-34. The suit sought specific performance of the two settlement agreements

involved in the settlement of $187,500.00, and sought a determination of all claims of all defendants to the balance of the settlement proceeds. Pet. App. 6.

One settlement agreement was with Skelton, calling for him to pay $37,500.00 to Spencers in full settlement of all claims by Spencers against Skelton, and Skelton's interests, as raised in a legal action brought in District Court, Bonneville County, Idaho, in 1964, under Case No. 13,674. The suit alleged damages in a sale by the Executor Bank to Skelton of an interest of S. R. Spencer, who died in 1960, in certain livestock auction enterprises in Idaho Falls, Idaho. The suit was not settled as to the Executor Bank. Pet. App. 2-3, 5-6. R. T. & A. represented Spencers in that suit, commencing in 1970. Pet. App. 3-4.

The second settlement agreement involved a potential shareholders' action against the Commission Co. to recover the value of the Estate shares in that company including damages for non-payment of dividends since the death of S. R. Spencer some 13 years previously. R. T. & A., as attorneys for Spencers, had brought proceedings against the Executor Bank, Case No. 4193, Bonneville County, Idaho, for removal of the Executor or to compel the Executor to bring such a suit against the Commission Co. There was a trial held in November, 1971, in Case No. 4193, in which R. T. & A. represented Spencers and in which Executor Bank, as well as Skelton and the Commission Co., defended against the relief sought by Spencers. At the time of the May 2, 1973 settlement that case had been fully briefed and was waiting decision by the judge. The potential of an adverse decision against Executor Bank, and thus indirectly against Spencer and his Commission Co., was a pressure point contributing

toward the package settlement, and in fact, the judge had been requested to hold up issuing a decision in Case No. 4193 pending the settlement. Res. App. Item 1.

Spencers filed an Amended Answer and Counterclaim in the specific performance action, Case No. 20,500, on November 7, 1974. This did not question venue nor demand a jury trial. Clerk's Record on Appeal to the Supreme Court of Idaho, ("R"), pp. 63-74. In 1973 Louise Spencer resided in Denver, Colorado. Pet. App. 41, 43. The case was tried to the court. R 132-142.

On January 21, 1976, the District Court, Bonneville County, Idaho, granted judgment of specific performance in Case No. 20,500, specifically enforcing both settlement agreements and ordered that the balance of the settlement price, the sum of $157,500.00 be paid by Skelton and the Commission Co. into court. Pet. App. 44-50. The court judgment specifically ruled that the funds would be held by the court for distribution following a subsequent hearing on the merits as to the claims of the parties to the funds. Pet. App. 49. Spencers, the Spencer Children, and the Executor Bank were all parties to that proceeding. Spencers appealed that decision to the Supreme Court of the State of Idaho. By decision of June 27, 1977, which became final on July 28, 1977, Pet. App. 50-51, the Supreme Court of Idaho affirmed the judgment of the trial court. The balance of $157,500.00 owing by Skelton and Commission Co., on the settlement, was paid into court. Pet. App. 6.

On August 3, 1977, R. T. & A. brought a claim in intervention, claiming an attorneys' charging lien against the funds on deposit in court, and seeking recovery of

attorneys' fees from that fund. Pet. App. 51-54. This proceeding was instituted by an affidavit of Gordon S. Thatcher which referred to a Notice of Attorneys' Claim of Lien dated February 10, 1975, which set forth fully the claim of R. T. & A. to attorneys' fees. Pet. App. 35-43. That Notice of Attorneys' Claim of Lien bore the caption of all three cases, had been filed on February 13, 1975, in the S. R. Spencer Estate, Case No. 4193, in the damage action, Case No. 13,674, and in the specific performance action, Case No. 20,500, wherein the funds were held, and had been served on counsel for Spencers, the Executor Bank, Skelton, and the Commission Co. R110-116; Pet. App. 6.

The court judgment in Case No. 20,500 specifically provided that it was binding upon the Executor Bank, and upon the estate, and a certified copy of the judgment was filed in the estate, Case No. 4193. The judgment also provided it was binding upon the parties in Case No. 13,674, and a copy of the judgment was filed in that case. Pet. App. 45-46, 47-48.

Although R. T. & A. did not file in Case No. 20,500, a pleading designated as a motion for leave to file a complaint in intervention, specifying Rule 24(a), Idaho Rules of Civil Procedure, both the District Court and the Supreme Court of Idaho treated the claim to foreclose an attorneys' charging lien for attorneys' fees as a motion for and a complaint in intervention. Pet. App. 7, 9. The allowance of intervention was heard at a District Court hearing in Case No. 20,500, wherein all other claimants to the funds held by the court, namely the Executor Bank, Spencers, and the Spencer Children, appeared by counsel and were represented. Pet. App. 61-62. At the conclu-

sion of the hearing, the District Court denied the demand for a jury trial, ordered that the parties respond to the claim by R. T. & A., and ordered that the case would proceed to trial at a date certain in Bonneville County. Pet. App. 63-64. Thereafter Spencers filed a formal response, in the nature of an answer, to the allegations of R. T. & A. Pet. App. 65-69. All parties stipulated that the funds on deposit in court be placed in an interest-bearing account pending determination of the parties entitled thereto, Pet. App. 62, and later stipulated to continuance of the trial to December 14, 1977. R 228.

The claim in intervention of R. T. & A. was tried in a regular court trial on December 14, 1977, at which R. T. & A. presented their claim in intervention, and Spencers, Spencer Children, and Executor Bank all appeared, defended, cross-examined witnesses, were heard, were permitted to submit evidence, and were allowed to submit briefs. R 231-233; Transcript of Testimony, of 216 pages, which was Reporter's Transcript on Appeal to the Supreme Court of Idaho.

Although Spencers asserted in District Court that the claim must be brought in a separate action in Twin Falls County, and that they were entitled to a jury trial, Pet. App. 60, at no time in District Court did they ever raise any federal constitutional issue. Pet. App. 57-61, 65-69.

The District Court ruled in favor of R. T. & A. on their claim to foreclose the attorneys' lien for attorneys' fees, and with no reference to any federal constitutional issue. Pet. App. 63-64, 69-73.

Spencers appealed to the Supreme Court of Idaho. Pet. App. 1-31. They did not raise in their appeal any federal constitutional question, but relied wholly upon

State law for their assertions on appeal. Res. App. Items 2 and 3.

The Supreme Court of Idaho affirmed the judgment of the District Court, awarding attorneys' fees from the funds on deposit in court and from the trust fund held by the attorneys. No reference was made to any federal constitutional issue. Pet. App. 1-18.

ARGUMENT

I. Federal Constitutional Issues were not raised below; hence certiorari should be denied.

The federal questions asserted here were never raised, preserved, or passed upon by the State courts below. Under those circumstances there is no jurisdiction for certiorari under 28 U. S. C. § 1257. *Cardinale v. Louisiana,* 394 U. S. 437 (1969); *Hill v. California,* 401 U. S. 797 (1971).

Petitioners claim to have raised federal questions at the trial. Pet. 8. But they did not. Louise Spencer raised state law questions of whether intervention was proper, whether she was entitled to a trial in the county of her present residence, and whether she was entitled to a jury trial. No mention was ever made in the trial court, of the United States Constitution nor any provision thereof, and particularly, no reference was made to Amendment 14. No mention was made in the trial court of a violation of "due process of law," nor to a denial of "equal protection of law."

Petitioners also assert that federal questions were raised on their appeal to the Idaho Supreme Court. Pet. 10. But they were not. Rule 35(a)(3), Idaho Appellate Rules, requires that an appellant's brief contain "issues presented on appeal." This requires:

> . . . a list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail.

The Appendix to this Brief quotes verbatim the Issues Presented on Appeal by Petitioner, before the Supreme Court of Idaho, Res. App. Item 2. By no stretch of the imagination can those issues be construed to encompass the federal constitutional issues now raised in this court. Rule 35(a)(5), Idaho Appellate Rules, also requires that an appellant's brief contain "points and authorities." This is stated as:

> A statement of the several propositions of law claimed to be involved in the case and the authorities relied upon by appellant.

The points and authorities of Petitioner, before the Supreme Court of Idaho, are reproduced in the Appendix. Res. App. Item 3. No proposition of federal law nor federal authority is included. There is no reference in Appellants' Brief, nor in their Reply Brief, to any proposition of federal constitutional law nor to any federal authorities.

The Supreme Court of Idaho has long adhered to the rule that assignments of error (now issues) must be specified in an appellant's brief in order to be considered on appeal, and this is especially so where there are no authorities cited nor argument contained as to the issue. *Bolen v. Baker*, 69 Idaho 93, 203 P. 2d 376 (1949); *State v. Bur-*

ris, 101 Idaho 683, 619 P. 2d 1136 (1980). Where issues of equal protection or of due process, under the United States Constitution, Amendment 14, were not specifically raised in the state courts, it was not adequate, to support the jurisdiction for certiorari, that arguments of state law have been made on the procedural or evidence issues involved. *Beck v. Washington,* 369 U. S. 541 (1962); *Moore v. Illinois,* 408 U. S. 786 (1972); *Estate of Wilson v. Aiken Industries, Inc.,* 439 U. S. 877 (1978) (Mr. Justice Blackman, concurring).

II. The state courts applied state law, without impinging on federal constitutional rights, in permitting intervention, retaining original venue, and refusing a jury trial, for equitable enforcement of an attorneys' charging lien against court-deposited funds.

Petitioners have set forth a factual model, very different from the reality of this case, to bolster their belated claim to federal constitutional issues. Analysis shows that there was not involved any invidious discrimination against clients in favor of attorneys.

A. Intervention Proper.

The state courts here did not invent intervention to permit discrimination in favor of attorneys and against a client. Intervention to claim a fund deposited in court has long been recognized in Idaho jurisprudence. *Pence v. Sweeney,* 3 Idaho [Hasb.] 181, 28 Pac. 413 (1891). Intervention of right has long been recognized under Rule 24 (a), Idaho Rules of Civil Procedure, which is identical to Rule 24 (a), Federal Rules of Civil Procedure, except

that the words "State of Idaho" replace the words "of the United States" in the Federal Rule.

Rule 24 (c), Idaho Rules of Civil Procedure, provides:

> *Procedure*—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

In this case, the motion was in the form of the Affidavit of Gordon S. Thatcher, Pet. App. 51-54, coupled with the Order and Order to Show Cause setting the claim of intervention, in the Affidavit, for hearing. Pet. App. 54-56. The trial court, in effect, permitted the intervention, and ordered the other parties, including Petitioners herein, to file pleadings setting forth their position on the matter, and the case was set for trial. Pet. App. 62-64. Petitioners herein did, in fact, file a response, in the form of an answer, Pet. App. 65-69, and the case, as previously discussed, was fully tried to the court. The pleading by R. T. & A. referred to the previous filed and served Notice of Attorneys' Claim of Lien, Pet. App. 35-43, which fully set forth the nature of the claim. Under those circumstances there is substantial compliance with Rule 24 (c), Idaho Rules of Civil Procedure. Technical forms of pleading are not required in intervention. *Farina v. Mission Inv. Trust,* 615 F. 2d 1068 (5th Cir. 1980); *Spring Constr. Co. v. Harris,* 614 F. 2d 374 (4th Cir. 1980).

Petitioners apparently contend that the application for intervention was untimely. It was actually filed within six days after the decision of the Supreme Court of Idaho became final, ordering that the funds be paid into court. Under such circumstances the application is timely. *McDonald v. E. J. Lavino Co.,* 430 F. 2d 1065 (5th Cir. 1970).

Petitioners argue, in effect, that Respondents had no claim of lien, at least as to the settlement involving the Commission Co. The record shows, Res. App. Item 1, and the Supreme Court of Idaho so found, Pet. App. 11-12, 14, that the legal services of R. T. & A. directly contributed to the full package settlement of $187,500.00, and that the attorneys' charging lien extended to the total proceeds.

The presence of the attorneys' charging lien, against the fund on deposit in Case No. 20,500, gives the basis for intervention as a matter of right under Rule 24 (a), Idaho Rules of Civil Procedure. The attorneys' charging lien was not an aribtrary creation in this case to discriminate against the client in favor of the attorney. An early Idaho case recognized an attorneys' charging lien. *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243 (1910). Following *Dahlstrom*, which found the lien lost if the client settled a judgment directly, before the lien was enforced, the Idaho legislature, in 1911, amended an attorneys' lien statute so that it now reads, Idaho Code § 3-205, as follows:

> 3-205. Attorneys' fees—Lien.—The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment.

The Supreme Court of Idaho, in this case, found the statute applicable to impress a lien upon the total package

settlement of $187,500.00. This is fully consistent with the statute where the attorneys' services were in Case No. 13,674, and the proceeds of the settlement in that case were traced directly into funds on deposit in 20,500, and the services of the attorneys were also in Case No. 4193, to make recovery for the estate of the then dormant and valueless interest in the Commission Co., and the proceeds of that settlement were directly traceable into Case No. 20,500.

This court has recognized an attorneys' charging lien enforceable in equity against the fruit of his labors. *Wylie v. Coxe*, 56 U. S. [15 How.] 415 (1853); *Ingersoll v. Coram*, 211 U. S. 335 (1908); *McGowan v. Parish*, 237 U. S. 285 (1915). And this has included by way of intervention. *Barnes v. Alexander*, 232 U. S. 117 (1914).

Petitioners assert they were not afforded the protection of the Idaho Rules of Civil Procedure. This is a mere unsupported assertion contrary to what Petitioners themselves acknowledged during the proceedings. As shown in Clerk's Record, R211, Mr. Lloyd J. Webb, as counsel for Petitioners, issued a Notice of Hearing as to their motion to strike the order, and their response to the Order to Show Cause, set for August 24, 1977, and included in that Notice this statement:

> Under Rule 7(b)(3) I. R. C. P., the said Defendants desire oral argument on this motion.

B. Original Venue Correct.

Petitioners contend that a special venue rule was applied in this case, to the benefit of the lawyers and to the detriment of their clients. To the contrary, the state courts applied the settled venue rules.

The basic venue statute, Idaho Code § 5-404, provides in material part:

> In all other cases the action must be tried in the county in which the Defendants, or some of them, reside, at the commencement of the action. . . .

Idaho Code § 5-404 provides as to non-resident defendants, a plaintiff may designate any county in Idaho. If there is a corporate defendant, action may be filed in the county where the cause of the action arose. This action, Case No. 20,500, was filed in Bonneville County on December 6, 1973. R 4. This is the county where the cause of action arose, and there is a corporate defendant, Idaho First National Bank.

Louise Spencer has made no contention that she resided in Twin Falls County, Idaho on December 6, 1973, but states in her affidavit of August 10, 1977 that her present residence is Twin Falls County, Idaho. Pet. App. 60. She was a resident of Denver, Colorado, in 1973. Pet. App. 41, 43. Trial Transcript p. 124, ll. 15-19; p. 182, ll. 6-15. She was still in Denver on January 23, 1975. R 89-108; Trial Transcript p. 138, ll. 11-14.

Although a party may request a change of venue on a discretionary basis, and based upon convenience of witnesses, as to conditions existing after commencement of an original action, the demand for change of venue, based upon residence of a Defendant, is based upon circumstances at the actual commencement of the action. *Sweeney v. American Nat. Bank*, 64 Idaho 695, 136 P. 2d 973 (1943); *Big Springs Land & Livestock Co. v. Beck*, 45 Idaho 509, 263 Pac. 477 (1928).

Consistent with that settled rule, the Supreme Court of Idaho dealt with the venue question at footnote 3 of its opinion, Pet. App. 13-14, as follows:

> Our determination that the petitioning herein was a proper method of raising and seeking to enforce the attorneys' lien regarding these claims disposes of appellant's venue objection. (Appellant asserted that venue was proper only in Twin Falls County, the county of her residence. I. C. § 5-404). Venue in the Seventh District Court in Bonneville County would be improper only if an independent action was required as to all or part of the claims here asserted by the attorneys. Such is not the case.

Thus the decision of the Supreme Court of Idaho, on venue, was on a reasonable basis and was not arbitrary. Under those circumstances, there is no issue of denial of equal protection of the law. *American Motorists Ins. Co. v. Starnes*, 425 U. S. 637 (1976).

C. No Jury of Right in Equity.

Petitioners assert discrimination in refusing a jury trial. To the contrary, the Supreme Court of Idaho applied the long-standing rule that there is no jury of right in an equitable proceeding to foreclose a lien.

An early Idaho case held that there was no right to a trial by jury, under the Idaho Constitution, in an equitable case. *Christensen v. Hollingsworth*, 6 Idaho 87, 53 Pac. 211 (1898). Earlier this court decided that a suit to enforce a mechanic's lien in Idaho Territory is a suit in equity, so that the court is not bound to submit any issue of fact to the jury in such a case. *Idaho and Oregon Land Improvement Co. v. Bradbury*, 132 U. S. 509 (1889).

In this case, the Supreme Court of Idaho recognized that the enforcement of an attorney's charging lien is an equitable procedure and upheld denial of a jury trial on that basis. Pet. App. 17.

This court has recognized the enforcement of the attorney's charging lien lies in equity. *Wylie v. Coxe*, 56 U. S. [15 How.] 415 (1853); *Ingersoll v. Coram*, 211 U. S. 335 (1908); *McGowan v. Parish*, 237 U. S. 285 (1915).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 17th day of September, 1981.

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APPENDIX

Item No.	Record Material	Reference
Item 1	Excerpts from Trial Testimony of Gordon S. Thatcher Tr. p. 10, l. 14 to p. 17, l. 24 with extraneous matter deleted:	Transcript of Trial of Dec. 14, 1977. Reporter's Transcript on Appeal to Supreme Court of Idaho.

Q. Would you state what that representation consisted of?

A. At that point there was a pending lawsuit pending in District Court in Bonneville County and it is Case Number 13-674. I think it is 13,674, actually, a suit that she had brought along with Alexa and Janet and Miriam against Leland Spencer, Carmen Spencer, Idaho Livestock Auction Company, Floyd Skelton, M. R. Skelton, and others, including the Idaho First National Bank, seeking, among other things, either damages or to set aside the sale of the interest of the estate in Skelton-Spencer Trading Company, a partnership, and Idaho Livestock Auction Company, a corporation. There had been a prior estate sale. She was aggrieved by that sale. This suit was filed to challenge the sale and it was then pending in District Court. It had been pending for a number of years. It had been to the Supreme Court and back, but had been more or less dormant for awhile. That was the principal thing and, then, of course, we were to look into other avenues of potential recovery.

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It involved the assets that had been—the Auction Company, the Livestock Auction Company in Idaho Falls, really there had been the partnership I mentioned, Skelton-Spencer Trading Company. There had been Idaho Livestock Auction Company, which held the license and operated the auction. There was Idaho Livestock Commission Company which owned the real estate on which the auction was operating. All of that was involved and, of course, it involved the estate of her deceased husband, Stanley Spencer.

Q. Now, did you perform services for her in connection with a petition to remove the executor of the estate, S. R. Spencer?

A. Yes. It developed during the course of the proceedings as we analyzed the whole situation that there was a very major complaint against Idaho Livestock Commission Company and its officers and shareholders and also against the executor, if I could give a brief resume, that the commission company owned the real estate and, as near as I can recall it, it is what we call a net net lease. There was cash rent paid by Idaho Livestock Auction Company to the Idaho Livestock Commission Company in a substantial amount annually. In addition, the auction company did all the repairs, paid the insurance and paid the real estate taxes, according to my memory. The rent was collected and prior to Mr. Spencer's death salaries had been paid out and we felt we could establish a fairly reasonable connection between the shareholdings in the estate and the payment of salaries. After Mr. Spencer died the remaining shareholders continued to receive salaries, but our investigation showed that no money had ever been paid over the period of many years to the estate

for that asset. So, we filed a petition, and I am speaking from memory here. We sought to remove the executor for various grounds, including the failure to proceed on the suit involving the commission company.

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We asked alternatively that the executor be compelled to bring a shareholder's suit against Idaho Livestock Auction Commission Company and its other shareholders seeking relief against them.

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Q. Now, could you detail what happened after the filing of the petition to remove the executor and to have the disclaimers approved?

A. All right, we had a hearing on the day after Thanksgiving, 1971, and I think I looked that up to refresh my memory. I think it was the 26th of November, 1971. We held a hearing—I think it was in this courtroom, as I remember, before Judge McCoy, and our petition was resisted by the executor or at least the executor was here and I am sure he resisted it. Mr. Holden, Bill Holden was here on behalf of the auction company and the Skelton interest. They also resisted and gave us opposition. We held an evidenciary [sic] hearing, and I am talking from memory. I think we had some recesses where there were settlement feelers and we spent quite a bit of time trying to see if we could settle the case, but ultimately we submitted it to the judge and then the judge—let's see, the parties called for a transcript, as I remember, so a transcript had to be prepared and, following the transcript, briefs. The transcript was prepared. We filed briefs.

My recollection is that a considerable period of time went on without any briefs being filed in opposition and this is just from memory.

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Then the thing went on for months even after then, even after the briefs were submitted, without a decision and it approached the time of the trial and I think the trial in Case 13,674 in district court . . .

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. . . in the course of settlement negotiations the matter that a decision may be imminently ready to be issued became a point of negotiation in terms of settling the lawsuit and all other claims between the parties and the judge was advised: Look, we are trying to settle all these claims. Hold up on issuing your decision on the removal and disclaimer . . .

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Then, after Case 13,674 and related matters were settled in a package settlement we were discharged before that was finally consummated and I do not know the progress of that suit since that date. We had it finally submitted and were trying to get a decision out of the judge when settlement was reached and thereafter when we were discharged as attorneys I don't know the progress of that case.

Tr. p. 25, ll. 3 to 25:

Q. Now, this may already be evidence cognizable by this Court, but, to make sure, what was the amount of the settlement reached in Case Number 13,674?

A. All right, it involved the settlement of that lawsuit as to some of the defendants—I should make that clear—expressly reserving all of the rights against Idaho First National Bank and it also involved a settlement of the claim to the Idaho Livestock Commission Company and part of the settlement was that the estate's interest in those shares would be sold and transferred and assigned to Mr. Skelton and for a lump settlement of $187,500.00. After we arrived at that lump settlement then Mr. Holden for the Skelton interest said that we ought to divide it some way between the two and they proposed a figure and it would be in the settlement documents. I think it was $150,000.00 and $37,500.00, $150,000.00 assigned to Idaho Livestock Commission Company, $37,500.00 assigned to the settling of 13,674, reserving rights against the bank. We discussed this with Louise. We discussed it with John Perry. It didn't matter to Louise or to us how it was done because it was a lump settlement which had been contemplated it would happen. So, we said, "All right, it doesn't matter to us. Go ahead and divide it that way," and the settlement documents were so structured.

Tr. p. 72, l. 2 to p. 73, l. 1.

Q. Now, could you tell us under what theory or principle do you believe that that should create a lien on the funds that have come out of Case Number 20,500?

A. All right, that proceeding which I have denominated by that title, removal of executor and approval of disclaimer of heirs included the basic contention that the executor should be removed [f]or, among other reasons, that it had failed to pursue the suit against Idaho Livestock Commission and that proceeding also included the

petition that the executor be compelled to bring that shareholder's suit. Now, when we settled the case with a package settlement the $150,000.00, although that was an arbitrary figure, that was assigned to the settlement of that claim including the stockholder's suit that we had applied and petitioned the court to compel the executor to bring. So it was directly related to the settlement. The very fact that we asked the judge to hold up ruling on that petition indicated the pressure point it was with the defendants, the Skelton defendants, and also the bank, I suppose, although they weren't in the settlement. We asked the judge to hold it up, that it was pending, that was an integral part of what [brought] about the settlement and as a result of it the $187,500.00 was brought into the estate that was not there before. So, that proceeding was an integral part of bringing about the money settlement and we are claiming our fee out of the money settlement that was brought in.

Tr. p. 82, ll. 2 to 23, with extraneous matter deleted.

Q. Now, as I understand it, you said that you were paid $30,000.00 and you refer to it as a down payment. I don't understand exactly.

A. The $30,000.00 was paid to Louise and placed in our trust account as a down payment on the aggregate settlement of $187,500.00. Then our notice of attorney's claim of lien gives a true accounting in paragraph number 9 on page 5 of what happened to those proceeds.

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Q. The $30,000.00 came from Skelton?

A. Yes. That was part of the $187,500.00 package settlement. That was the down payment on it.

Item 2	Excerpt from Louise Spencer Brief on Appeal to the Supreme Court of Idaho, Case No. 12969, including a complete reproduction of "Issues presented on Appeal."	Appellants' Brief 19-20.

II.

ISSUES PRESENTED ON APPEAL

1. Were there procedural errors of prejudicial dimension committed by the trial Court in the disposition of this case:

A. Can attorneys' fees be claimed and collected in an action collateral to the case in which the fees were allegedly earned or is an independant [sic] civil action required to collect such fees.

B. In an action to collect attorneys' fees in other than the case in which the fees are allegedly earned, are the jurisdictional and venue requirements the same or different than in other cases.

C. In an action to collect attorneys' fees in other than the case in which those fees are allegedly earned are the procedural rules the same or different from those applicable to other claims.

D. In an action to collect attorneys' fees in other than the case in which the fees are allegedly earned is the defendant entitled to a jury trial.

E. Can a claim for attorneys' fees be made in any particular case, other than by independent action instituted for that purpose, where that claim does not relate to the case itself but rather relates to a totally separate area of activity on behalf of the client.

2. Was there an enforceable agreement for the payment of attorneys' fees in this case.

3. If there was such an enforceable agreement to pay attorneys' fees:

A. Did the agreement apply to the "settlement" achieved in Bonneville Case No. 13,674;

B. Did the agreement apply to that part of any "settlement" representing a price paid by a party to Case No. 13,674 for the purchase of stock owned by the Appellant in a corporate entity which was not involved in that case.

4. Assuming an enforceable agreement for the payment of attorneys' fees, has the obligation of the Appellant ripened and have the attorneys become entitled to payment in view of:

A. The fact that the decision in the Personal Representative removal/disclaimer matter has never been entered;

B. That fact that the "settlement" in Case No. 13,674 has never been implemented in that a critical factor to the completion of that "settlement" has never been accomplished, that is the obtaining of the signatures of the heirs upon the agreement of "settlement", and the payment of any settlement proceeds to the client.

Item 3	Excerpt from Louise Spencer Brief on Appeal to the Supreme Court of Idaho, Case No. 12,969, including a complete reproduction of all legal points raised on appeal, with all legal authorities cited on points 1 through 4. Legal authorities on points 5 through 9, which include no citations to federal law, are omitted.	Appellants' Brief 22-24.

IV.

POINTS AND AUTHORITIES

1. Claims for attorneys' fees, like any other claims, must be prosecuted in an independent civil action.

Benting v. Spanbauer, 58 Idaho 44, 46 (1937);

Gooding v. Lyon, 166 P. 564, 565 (Colo. 1917);

Lundy v. Cappuccio, 181 P. 165, 167 (Utah 1919);

Berrum v. Georgetta, 98 P. 2d 479, 480 (Nev. 1940);

Midvale Motors v. Saunders, 442 P. 2d 938, 941 (Utah 1968);

Lee v. Lee, 482 P. 2d 745, 747-8 (Oreg. App. 1971);

7 C. J. S. 1204 (*Attorney and Client*, § 238a);

7 C. J. S. 1208-1209 (*Attorney and Client*, § 238g);

2. Summary procedure is inappropriate for the enforcement of an attorneys' fee claim; it must be processed as are other claims.

Crawford v. Crane, 282 P. 2d 348, 351-2 (Oreg. 1955).

3. Jurisdiction and venue rules in attorneys' fee claim cases are the same as those in any other case.

7 C. J. S. 1206 (*Attorney and Client*, § 238d).

4. The same procedural rules apply to attorneys' fee claims as to any other claim.

7 C. J. S. 1205 (*Attorney and Client*, § 238b);

7 C. J. S. 1211 (*Attorney and Client*, § 238i);

In Re Sebring, 264 N. Y. S. 379 (1933);

Midvale Motors, Inc. v. Saunders, 442 P. 2d 938, 941 (Utah 1968);

Lee v. Lee, 482 P. 2d 745, 747-8 (Oreg. App. 1971).

5. Any ambiguities in a fee contract are resolved in favor of the client and against the attorney.

6. In contingent fee contract cases the percentage payable by the contract is payable only when the client collects the money; it is not payable upon the mere obtaining of a "settlement" or judgment.

7. The happening of the contingency is a condition precedent to an attorney's right to a fee in a contingent fee case.

8. In flat fee cases where an attorney contracts for a certain fee upon the completion of certain work he is not entitled to that fee until the work is completed.

9. In attorney-client contracts the claimant attorney is obliged to prove the contract was "fairly and openly made" with adequate consideration and in full knowledge of the facts and legal rights of the client.